

In the Matter of Merchant Mariner's Document No. Z-884627 and all
other Licenses, Certificates and Documents
Issued to: BEN SIMMONS

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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BEN SIMMONS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 29 November 1954, an Examiner of the United States Coast Guard at New York, New York, revoked Merchant Mariner's Document No. Z-884627 issued to Ben Simmons upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as a able seaman on board the American SS FLYING EAGLE under authority of the document above described, on or about 12 April 1954, he wrongfully had marijuana in his possession.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by nonprofessional counsel of his own selection and he entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence several sworn statements by U. S. Customs employees, certified copies of entries in the Official Logbook of the FLYING EAGLE and a Chemist's Report of the Department of Justice, Bureau of Narcotics, State of California, signed by H. F. Bergmans, Narcotics Chemist Inspector. The latter report states that Appellant was the defendant in a case involving evidence which analysis showed consisted of 48 grains of marijuana.

In defense, Appellant offered in evidence his own sworn testimony and documentary evidence showing that Appellant was found "not guilty" by the Superior Court of California, San Francisco, after arraignment on the charge of unlawful possession of marijuana on 12 April 1954. In his testimony, Appellant stated that his locker was often open at sea; he did not know marijuana was in his locker or he would have thrown it away; and he does not use marijuana. Appellant admitted that the Customs searchers found

marijuana in his locker.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the specification. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-884627 and all other licenses, certificates and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is urged that Appellant has no knowledge as to how the marijuana got in his locker; he had no other recourse than to speculate as to how the marijuana got in his locker; it could have been placed there by other persons; consideration should be given to Appellant's clear record during 35 years at sea in view of the circumstantial nature of the evidence; and Appellant should be permitted to continue his livelihood at sea.

APPEARANCES: Mrs. Edna Simmons
 Mr. Joseph Francis
 Mr. Herbert W. Upshur

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 12 April 1954, Appellant was serving as an able seaman on board the American SS FLYING EAGLE and acting under authority of his Merchant Mariner's Document No. Z-884627 while the ship was in the port of San Francisco, California.

During a routine search of the ship for contraband by U. S. Customs authorities on the afternoon of 12 April 1954, Appellant unlocked his locker and it was searched by two Port Patrol officers. They found an Anacin box, containing a substance which they thought was marijuana, on a shelf in Appellant's locker. On another shelf in the locker, they found a loose quantity of a similar substance. Appellant was asked if he smoked marijuana and he replied in the negative. No other evidence of marijuana was found on the ship.

Appellant was arrested by the federal authorities, removed from the ship and turned over to the State of California narcotics officials after the U. S. Attorney declined prosecution because of

the small quantity involved. Analysis disclosed that the contents of the Anacin box consisted of 28 grains of marijuana and that the loose substance was 20 grains of marijuana.

On 12 August 1954, Appellant was acquitted by the Superior Court of the State of California in and for the City and County of San Francisco on his plea of "not guilty" to the charge of willfully, unlawfully and feloniously having possession of a quantity of marijuana.

OPINION

Possession of the marijuana raised a rebuttable presumption or inference that Appellant knew he had the narcotics in his possession. Therefore, a prima facie case of wrongful possession was made out against Appellant by the proof of possession. The ex parte statements, which were introduced in evidence, were consistent with each other and corroborated by Appellant's own testimony as to the search and the finding of marijuana by the Customs authorities. Hence, the only material fact contained in these ex parte statements - Appellant's possession of marijuana - could not have prejudiced Appellant's cause due to lack of cross-examination. These statements were also corroborated by log entries and the Chemist's Report of the analysis of the substance found in Appellant's locker. The log entries and report are exceptions to the hearsay rule because they are records made in the regular course of business, 28 U.S.C. 1732. For these reasons, there is substantial evidence of the alleged offense despite the hearsay nature of the ex parte statements and although uncorroborated hearsay does not constitute the substantial evidence which is the degree of proof required in these administrative proceedings.

Since the Examiner did not accept Appellant's explanation that some other person must have placed the marijuana in Appellant's locker, the order of revocation was mandatory in this narcotics case. 46 CFR 137.03-1, 137.21-10. Appellant was able to exercise exclusive control over the contents of his locker because he had the only key to it (R.21). Furthermore, it is not necessary that the possession be "exclusive" in order to invoke this rebuttable presumption of knowledge of possession. Borgfeldt v. U.S. (C.C.A. 9, 1933), 67 F2d 967, 969. Although other persons might have had access to Appellant's locker at some times while the ship was at sea, Appellant certainly had predominant control at all times and exclusive control for some period of time prior to unlocking it for the Customs search.

An Appellant's prior unblemished record cannot be considered in mitigation in any case involving narcotics.

ORDER

The order of the Examiner dated at New York, New York, on 29
November 1954 is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 13th day of June, 1955.